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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 09-48102-D-11
IREVA HOLDINGS, LLC,)
Debtor.)

IREVA HOLDINGS, LLC,) Adv. Pro. No. 10-2535-D
Plaintiff,) Docket Control No. HSM-1
v.)
CONSERVATION ENDOWMENT FUND,)
Defendant.) DATE: April 27, 2011
TIME: 10:00 a.m.
DEPT: D

and related counterclaim.

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION

The parties to this adversary proceeding, defendant/counter-claimant Conservation Endowment Fund ("CEF") and plaintiff/counter-defendant Ireva Holdings, LLC ("Ireva") have filed cross-motions for partial summary judgment. For the reasons discussed below, the court will grant CEF's motion and deny Ireva's motion.

I. INTRODUCTION

The following facts are not in dispute. Ireva owns a hotel property commonly known as 28 South Lassen Street, Susanville,

1 California (the "property"). CEF holds a deed of trust against
2 the property securing an obligation on which Ireva has, since at
3 least August 2009, been in default. The obligation became all
4 due and payable on February 1, 2010. CEF has filed a proof of
5 claim in Ireva's chapter 11 case contending the obligation
6 amounts to not less than \$780,329.

7 In December 2009, the property was flooded and sustained
8 severe water damage. Ireva had earlier obtained an insurance
9 policy on the property issued by Evanston Insurance Company
10 ("Evanston"), which has paid out approximately \$670,146 on the
11 water damage claim. After deduction of approximately \$135,000
12 paid to a remediation company and certain other sums, there
13 remains, according to Ireva's attorney, approximately \$500,000
14 which he holds in his trust account pending resolution of the
15 rights of CEF and Ireva thereto. These remaining proceeds are
16 the subject of the cross-motions.

17 Ireva filed the petition commencing the chapter 11 case in
18 which this adversary proceeding arises on December 23, 2009,
19 after the flood damage had occurred but before Evanston had paid
20 out anything on the insurance claim.

21 II. ANALYSIS

22 This court has jurisdiction over the cross-motions pursuant
23 to 28 U.S.C. sections 1334 and 157(b)(1). The cross-motions are
24 core proceedings under 28 U.S.C. section 157(b)(2)(B) and (K).
25 The cross-motions are brought pursuant to Fed. R. Civ. P. 56,
26 made applicable in this proceeding by Rule 7056.¹

27
28 1. Unless otherwise indicated, all Code, chapter, and
section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
(continued...)

1 A. Standards for Summary Judgment

2 Where a motion for summary judgment is before the court, the
 3 court is to render judgment for the movant if "the movant shows
 4 that there is no genuine dispute as to any material fact and the
 5 movant is entitled to a judgment as a matter of law." Fed. R.
 6 Civ. P. 56(a), incorporated herein by Rule 7056. The moving
 7 party bears the burden of producing evidence showing that there
 8 is no genuine issue of material fact and that it is entitled to
 9 judgment as a matter of law. Celotex v. Catrett, 477 U.S. 317,
 10 322-23, 106 S. Ct. 2548, 2552 (1986). Once the moving party has
 11 met its initial burden, the non-moving party must show specific
 12 facts demonstrating the existence of genuine issues of fact for
 13 trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106
 14 S. Ct. 2505, 2514 (1986).

15 B. CEF's Interest Prevails Over Ireva's § 544(a) Powers

16 The cross-motions concern the first and second causes of
 17 action of Ireva's complaint -- to determine that CEF does not
 18 have a perfected security interest in the proceeds and to avoid
 19 an unperfected lien in the proceeds, and the first two causes of
 20 action of CEF's counterclaim -- for declaratory and injunctive
 21 relief.² As to these causes of action, the parties agree there
 22 are no genuine disputes as to any material facts.

23 The central issue is whether CEF had, at most, an equitable
 24 lien in the insurance proceeds, unperfected as against a

25 1. (...continued)

26 1532. All Rule references are to the Federal Rules of Bankruptcy
 27 Procedure, Rules 1001-9037.

28 2. The cross-motions do not concern Ireva's third cause of
 action, an objection to CEF's claim.

1 hypothetical judgment lien creditor or a bona fide purchaser, and
2 therefore, subject to avoidance by Ireva as the debtor in
3 possession in this case, pursuant to § 544(a), or whether, by
4 virtue of the language of its deed of trust, CEF had an interest
5 in the proceeds sufficient to put subsequent judicial lien
6 creditors and bona fide purchasers on constructive notice, such
7 that CEF's interest prevails over Ireva's rights and powers under
8 § 544(a).

9 The relevant language in CEF's deed of trust is found in
10 paragraph 5:

11 5. Hazard Insurance. Borrower agrees to provide,
12 maintain and deliver to Lender fire insurance
13 satisfactory and with loss payable to Lender. The
14 amount collected under any fire or other insurance
15 policy may be applied by Lender upon any indebtedness
secured hereby and in such order as Lender may
determine, or at option of Lender the entire amount so
collected or any part thereof may be released to the
Borrower. . . .

16 If Borrower obtains earthquake, flood or any other
17 hazard insurance, or any other insurance on the
18 Property, and such insurance is not specifically
19 required by the Lender, then such insurance shall: (i)
name the Lender as loss payee thereunder, and (ii) be
subject to all of the provisions of this paragraph 5.

20 CEF's Ex. B, p. 7.

21 It is undisputed that under this language, Ireva was
22 required to name CEF as loss payee on the Evanston policy, and
23 that Ireva did not do so. Thus, CEF opens with the contention
24 that it has an equitable lien on the proceeds, under Alexander v.
25 Security-First Nat'l Bank, 7 Cal. 2d 718 (1936):

26 [I]f there is an agreement for insurance between
27 parties standing in these relationships [lessor/lessee,
mortgagor/mortgagee, vendor/vendee], and the party
28 obligated, in violation of his agreement, procures
insurance payable to himself alone, the other party for

1 whose benefit the agreement was made has an equitable
2 lien on the proceeds of such insurance.

3 7 Cal. 2d at 724.

4 However, it is also undisputed that CEF did not file a UCC-1
5 financing statement with the Office of the Secretary of State.
6 Thus, Ireva argues that even if CEF has an equitable lien on the
7 proceeds as a result of Ireva's failure to name CEF as loss
8 payee, the equitable lien is unperfected and thus is defeated by
9 Ireva's strong-arm powers under § 544(a).³

10 Section 544(a) permits a trustee, and by way of § 1107(a), a
11 debtor in possession, to avoid transfers of property of the
12 debtor that would be voidable by a judicial lien creditor or bona
13 fide purchaser under state law. The section also permits
14 avoidance of unrecorded interests in real property, even where
15 there has been no transfer. In re Seaway Express Corp., 912 F.2d
16 1125, 1128 (9th Cir. 1990). The § 544(a) rights of a trustee or
17 debtor in possession as a hypothetical bona fide purchaser or
18 judicial lien creditor are defined by state law. Robertson v.
19 Peters (In re Weisman), 5 F.3d 417, 420 (9th Cir. 1993) (bona
20 fide purchaser); Siegel v. Boston (In re Sale Guaranty Corp.),
21 220 B.R. 660, 669 (9th Cir. BAP 1998) (judgment lien creditor).

22 Ireva's argument depends on these three propositions: (1)
23 that "[t]he Insurance Proceeds are a 'general intangible,'" as

24
25 3. Ireva does not seriously dispute, if at all, that absent
26 the intervention of bankruptcy, the language of the deed of trust
27 would result in CEF having an enforceable equitable lien in the
28 proceeds senior to any interest of Ireva. "Ireva has never
disputed that CEF could obtain a judgment for an equitable lien
on the Insurance Proceeds in a state court." Counter Motion and
Opposition to Motion for Partial Summary Judgment, filed April
26, 2011 ("Counter Motion"), 2:21-22.

defined in Cal. Comm. Code § 9102(a)(42); (2) that "the Insurance Proceeds are within the scope of Article 9 [of the California Commercial Code];" and (3) that "[a]s a result, CEF was required to file a UCC-1 financing statement in order to perfect any alleged security interest in the Insurance Proceeds." Counter Motion, 5:17-22, 6:1-4.

The first of these propositions -- that the proceeds are a general intangible -- may or may not be correct.⁴ The second -- that the proceeds are within the scope of Article 9 -- is correct.⁵ However, the third and most important for present purposes -- that CEF was required to file a UCC-1 financing statement in order to perfect its interest in the proceeds -- is not correct.⁶

4. The former definition of "general intangibles," in former Cal. Comm. Code § 9106, included this sentence: "Any interest or claim in or under any policy of insurance is a general intangible." See Dynair Electronics, Inc. v. Video Cable, Inc., 55 Cal. App. 3d 11, 17 (1976). The present definition, in Cal. Comm. Code § 9102(a)(42), does not. Because the issue in this case turns on Ireva's third proposition (see below), it is not necessary that the court determine whether "general intangibles," as presently defined in the Commercial Code, includes insurance policies and claims in or under insurance policies.

5. See 321 Henderson Receivables Origination LLC v. Sioteco, 173 Cal. App. 4th 1059, 1074-75 (2009).

6. Ireva cites no authority for this proposition, but merely alleges the second proposition as deriving from the first and the third as deriving from the second:

The Insurance Proceeds are a "general intangible," . . . Cal. Comm. Code § 9102(a)(42). At the commencement of the bankruptcy case, the Insurance Proceeds only existed as a general intangible (a cause of action against Evanston Insurance Co.). [¶] Accordingly, the Insurance Proceeds are within the scope of Article 9. As a result, CEF was required to

(continued...)

Subdivisions 9310(a) and (b)(11) provide:

9310. (a) Except as otherwise provided in subdivision (b) and in subdivision (b) of Section 9312, a financing statement must be filed to perfect all security interests and agricultural liens.

(b) The filing of a financing statement is not necessary to perfect a security interest that satisfies any of the following conditions: . . .

(11) It is a security interest in, or claim in or under, any policy of insurance including unearned premiums which is perfected by written notice to the insurer under paragraph (4) of subdivision (b) of Section 9312. (Emphasis added.)

Subdivision 9312(b)(4), in turn, states:

A security interest in, or claim in or under, any policy of insurance, including unearned premiums, may be perfected only by giving written notice of the security interest or claim to the insurer. (Emphasis added.)

The bottom line is that it simply was not necessary under Article 9 that CEF file a UCC-1 financing statement to perfect its interest in the proceeds.⁷

6. (...continued)
file a UCC-1 financing statement in order to perfect any alleged security interest in the Insurance Proceeds. Cal. Comm. Code § 9310(a).

Counter Motion, 5:17-6:3. As will be seen below, the section governing perfection of interests in and claims in or under insurance policies is § 9310(b), not § 9310(a).

7. The parties have not indicated whether CEF gave notice of its interest to Evanston, as required under § 9312(b)(4), but it seems unlikely, as in that case, CEF would have been added as a named loss payee. However, the purpose of such notice would have been to perfect CEF's interest as between it and Irevia and to protect Evanston from distributing the proceeds to the wrong entity.

The loss payable endorsement in an insurance policy "defines only the obligation of the insurer. [Citations.] The provision is intended to protect the (continued...)

1 Ireva next focuses on the use of the term "equitable lien"
2 in CEF's lead case, Alexander, and relies on several other cases
3 for the proposition that equitable liens (and constructive
4 trusts) are invariably "unperfected" for purposes of § 544(a).
5 The first of these is Markair, Inc. v. Markair Express, Inc., 172
6 B.R. 638 (9th Cir. BAP 1994), in which the Ninth Circuit
7 Bankruptcy Appellate Panel held that constructive trusts and
8 equitable liens, to the extent they remained inchoate at the time
9 of the bankruptcy filing (that is, to the extent the creditor had
10 not reduced its claim to judgment), are defeated by a trustee's
11 strong-arm powers under § 544(a). 172 B.R. at 641-43.

12 This and the other cases cited by Ireva are not relevant
13 here for the simple reason that they address the imposition of an
14 equitable lien or some other equitable remedy (express trust,
15 resulting trust, constructive trust) in the absence of a recorded
16 instrument sufficient to put a hypothetical judgment lien
17 creditor or bona fide purchaser on constructive notice of the

18 7. (...continued)

19 insurer by permitting it to pay the named insured and
20 to be thereafter free of claims by other persons who
21 might have an interest in the lost property." (Ferro
22 v. Citizens Nat. Trust & Sav. Bank (1955) 44 Cal. 2d
23 401, 410 [282 P.2d 849].) The rights of the parties do
24 not depend on the interpretation of the loss-payable
25 clause of the policy. [Citing Alexander 7 Cal. 2d at
26 p. 726.]

27 Ziello v. Superior Court, 36 Cal. App. 4th 321, 329-30 (1995).

28 Because Evanston was made aware of CEF's interest prior to
distribution, the problem has been avoided here. Ireva has not
alleged, nor could it, that notice to Evanston would have
provided actual or constructive notice to a hypothetical judicial
lien creditor or bona fide purchaser; thus, the issue of notice
to Evanston would contribute nothing to Ireva's position
regarding the proceeds. And as between CEF and Ireva, CEF
prevails under the Alexander decision.

1 creditor's claims (and in some cases, in the absence of any
2 documentation at all). See Markair, 172 B.R. at 643;⁸ In re
3 Seaway Express Corp., 912 F.2d at 1128-29;⁹ In re Lewis W.
4 Shurtleff, Inc., 778 F.2d 1416, 1419 (9th Cir. 1985) [unrecorded
5 deed]; In re North American Coin & Currency, Ltd., 767 F.2d 1573,
6 1576 (9th Cir. 1985);¹⁰ Huber v. Danning, 147 B.R. 526, 530 (9th
7 Cir. BAP 1992) [unrecorded grant deed]; In re Foam Systems Co.,
8 92 B.R. 406, 409 (9th Cir. BAP 1988) [neither express trust nor
9 resulting trust will be used to remedy failure to perfect
10 security interest]; Tort Claimants Comm. v. Roman Catholic
11 Archbishop (In re Roman Catholic Archbishop), 335 B.R. 868, 879
12 (Bankr. D. Or. 2005) [no notice of claimants' interests in real
13 property records].

14 Here, there was a recorded instrument sufficient to put a
15 hypothetical judgment lien creditor or bona fide purchaser on
16 constructive notice of CEF's interest in any insurance proceeds;
17 namely, the deed of trust itself, and in particular, the language
18 of paragraph 5. This fact distinguishes this case from those
19 cited by Ireva and brings it in line with those cited by CEF. In
20

21 8. "Airwork extended credit to the debtor, but did not
22 request or receive assignment of the insurance proceeds." Id.
23 It was particularly important that "Airwork did not rely in any
24 specific sense on payment from the proceeds, and the debtor did
not indicate that payment to Airwork would be guaranteed
therefrom." Id. at 642.

25 9. "When a creditor claims an inchoate equitable interest
26 in real property owned by the debtor at the commencement of the
27 case, which interest is not evidenced by a recorded instrument
and not yet granted by a state court, the trustee as bona fide
purchaser prevails." Emphasis added.

28 10. "[The customers] were never promised that any special
measures would be taken to protect their investments."

1 In re Terra Villa Apartments, Ltd., 101 B.R. 755 (Bankr. N.D.
2 Fla. 1989), a properly recorded deed of trust required the
3 property owner to insure the premises for the benefit of and
4 payable to the lender. As in this case, the owner failed to name
5 the lender as loss payee on the policy. The court held that the
6 provision in the deed of trust created an equitable lien in the
7 lender's favor and that the recorded deed of trust gave
8 constructive notice of the owner's obligation to insure the
9 property for the benefit of the lender, with the result that the
10 lender prevailed over the rights of the debtor in possession
11 under § 544(a)(3). 101 B.R. at 758-59.

12 The lender's right to insurance proceeds, granted by the
13 terms of a recorded deed of trust, also prevailed over a debtor
14 in possession in In re Moore, 54 B.R. 781 (Bankr. E.D.N.C. 1985).

15 The obligation on the part of the debtors to provide
16 insurance to protect [the lender's] security was a
17 conspicuous part of the recorded Deed of Trust and
18 Security Agreement. Any purchaser of the real property
19 would take the property subject to the deed of trust
20 and the obligations contained therein.

21 54 B.R. at 784.

22 Terra Villa Apartments and Moore were decided under Georgia
23 and North Carolina law, respectively. See Terra Villa
24 Apartments, 101 B.R. at 758; Moore, 54 B.R. at 784. California
25 law is to the same effect. Every properly recorded conveyance of
26 real property or of an interest in real property is constructive
27 notice of the contents thereof to subsequent purchasers and
28 mortgagees. Cal. Civ. Code §§ 1213, 1215, emphasis added.

29 Thus, "constructive or inquiry notice obtained in accordance
30 with California Civil Code section 19 can defeat a trustee's [§

544(a)(1)] claim." Robertson, 5 F.3d at 420, citing In re Probasco, 839 F.2d 1352, 1354-56 (9th Cir. 1988). Civil Code section 19, in turn, provides:

Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.

Cal. Civ. Code § 19. Such constructive notice is conclusively presumed from the act of recording. 612 South LLC v. Laconic Limited Partnership, 184 Cal. App. 4th 1270, 1278 (2010), quoting Gates Rubber Co. v. Ulman, 214 Cal. App. 3d 356, 364 (1989).¹¹

In short, under California law, a bona fide purchaser would have taken title to the property with constructive notice of CEF's deed of trust and the contents thereof, including paragraph 5, by which Ireva agreed to provide fire insurance satisfactory and with loss payable to CEF, and agreed that the proceeds of such fire insurance could be applied by CEF against the debt then owing or, at CEF's option, released to Ireva. A bona fide purchaser would also have had constructive notice that, as provided in the last sentence of paragraph 5, quoted above, any other insurance, such as the Evanston policy at issue in this proceeding, would be subject to those same provisions. Ireva's

11. A judgment lien creditor fares less well than a bona fide purchaser.

[U]nder California law, a judgment lien creditor is not a purchaser for value. In re Mellor, 734 F.2d 1396, 1401 n.4 (9th Cir. 1984) ("a judgment lien creditor is not a bona fide purchaser, and therefore is subject to all prior interests in the property, whether known or unknown, recorded or unrecorded")

Siegel, 220 B.R. at 669; 20th Century Plumbing Co. v. Sfregola, 126 Cal. App. 3d 851, 854 (1981).

1 status as a debtor in possession with the powers of a trustee
2 under § 544(a) is subject to CEF's rights under the deed of
3 trust, of which a hypothetical bona fide purchaser would have
4 been on notice, and Ireva cannot avoid CEF's interest in the
5 proceeds under that section.

6 This conclusion is based on California law governing bona
7 fide purchasers with constructive notice; it is unaffected by
8 certain cases cited by the parties suggesting that all equitable
9 liens are subject to the avoiding powers of a trustee or debtor
10 in possession under § 544(a). The cited language in those cases
11 is merely dicta; the holdings were based on lack of recordation.
12 For example, In re Chenich, 100 B.R. 512 (9th Cir. BAP 1987), the
13 panel concluded that a reference in a recorded deed of trust to
14 "any extensions or renewals" of the original secured notes was
15 sufficient to provide constructive notice of a subsequent
16 unrecorded extension agreement but not of unrecorded grant deeds
17 not mentioned in the extension agreement. 100 B.R. at 514. See
18 also Stepp v. McAdams, 88 F.2d 925, 928 (9th Cir. 1937)
19 [unrecorded contract did not create equitable lien].

20 Finally, Ireva's counsel argued at the hearing that to the
21 extent CEF is relying on recordation of the deed of trust as the
22 source of its right to the insurance proceeds, that right is
23 subject to Cal. Civ. Code § 2938, governing assignment-of-rents
24 clauses, and that because CEF's deed of trust does not refer to
25 an "assignment" of the insurance proceeds, no such assignment was
26 made. Counsel went on to suggest that an agreement to have
27 insurance coverage does not create an assignment of the insurance
28 proceeds; he cited the Alexander case for that proposition.

1 Cal. Civ. Code § 2938 applies to assignments of rents,
2 issues, and profits, not to insurance proceeds. The parties have
3 offered and the court has found no reason to believe use of the
4 word "assignment" is required in order for an equitable lien to
5 arise if the borrower breaches an agreement to provide insurance
6 for the benefit of the lender; the Alexander decision does not so
7 hold or even suggest. That case does stand for the proposition
8 that in the absence of agreement, a tenant has no obligation to
9 procure insurance for the benefit of his landlord, and vice
10 versa.

11 In the absence of special provisions in the lease there
12 is no obligation on the lessee to procure insurance for
13 the benefit of his lessor insuring against fire or
14 other risk, and neither lessor nor lessee ordinarily
has an interest in the proceeds of insurance obtained
by the other on his own separate insurable interest.

15 Alexander, 7 Cal. 2d at 723, emphasis added. The same rule
16 applies to the mortgagor/mortgagee relationship. Id. But if an
17 agreement does exist on the part of one to provide insurance for
18 the benefit of the other, as in this case, the breach of the
19 agreement gives rise to an equitable lien, id. at 724; words of
20 "assignment" are simply not required.

21 Under the authorities cited earlier, CEF's recorded deed of
22 trust provided constructive notice of its contents, including
23 paragraph 5, to bona fide purchasers. Thus, bona fide purchasers
24 had constructive notice that the proceeds of insurance on the
25 property could be applied by CEF to the indebtedness secured by
26 the deed of trust, or at CEF's option, released to Ireva. An
27 "assignment" of insurance proceeds akin to an assignment-of-rents
28 clause was simply not necessary.

1 C. CEF Has the Right to Control Disposition of the Proceeds

2 Paragraph 5 of the deed of trust plainly gives CEF the right
3 to control the disposition of the insurance proceeds, and Ireva's
4 obligation secured by the deed of trust is and for a long period
5 of time has been in default; in fact, the obligation became all
6 due and payable over a year ago. Under the decisions cited by
7 CEF -- Martin v. World Sav. & Loan Ass'n, 92 Cal. App. 4th 803,
8 808-09 (2001), and Ford v. Manufacturers Hanover Mortg. Corp.,
9 831 F.2d 1520, 1523-25 (1987), which are directly on point, CEF
10 has the right to control the disposition of the insurance
11 proceeds in its discretion. Ireva does not seriously contend
12 otherwise; instead, it merely falls back on its position that the
13 language of paragraph 5 is nothing more than a security agreement
14 for the insurance proceeds under Article 9 of the Commercial
15 Code, and that CEF failed to perfect its security interest. That
16 argument has been addressed above.

17 D. CEF Is Entitled to Injunctive Relief

18 In the second cause of action of its counterclaim, CEF seeks
19 to enjoin Ireva and its attorney from disbursing any of the
20 insurance proceeds without CEF's express written consent or order
21 of this court, and further requests that such relief be ordered
22 to survive any conversion of this case from chapter 11 to another
23 chapter and to survive any dismissal of this case. Ireva does
24 not oppose "an injunction notwithstanding dismissal or conversion
25 of the case that such Insurance Proceeds shall remain under the
26 jurisdiction of the Bankruptcy Court." Counter Motion, 12:17-20.

27 It appears the court's conclusions -- (1) that CEF's
28 interest in the proceeds prevails over any interest, right, or

1 power of Ireva, and (2) that CEF has the right to control the
2 disposition of the proceeds in its sole discretion -- would apply
3 in the case under any chapter to which it might be converted and
4 would also apply in the event of dismissal; Ireva does not
5 suggest otherwise. Thus, the court will grant the requested
6 injunction.

7 III. CONCLUSION

8 For the reasons discussed above, CEF's motion for partial
9 summary judgment will be granted; Ireva's will be denied.

10 The court will issue an appropriate order.

11 Dated: May 26, 2011


ROBERT S. BARDWIL

United States Bankruptcy Judge

CERTIFICATE OF MAILING

I, Kamee Vang, in the performance of my duties as Deputy Clerk to the Honorable Robert S. Bardwil, mailed by ordinary mail a true copy of the attached document to each of the parties listed below:

Kenrick Young
1930 Del Paso Rd., Suite 121
Sacramento, CA 95834

Aaron Avery
Hefner Stark & Marois
2150 River Plaza Dr., #450
Sacramento, CA 95833

DATE: 5-27-11

Kamee Vang
Deputy Clerk